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No. 91-1231

Supreme Court, U.S.
FILED
APR 17 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents contend that this case is moot because the court of appeals has already issued its mandate and, in the case of respondent Foster, the trial court has subsequently dismissed the indictment. Br. in Opp. 4-7.

a. The trial court in Dixon's case originally dismissed the indictment, while the trial court in Foster's case rejected Foster's double jeopardy challenge to his indictment. The government appealed the dismissal of the indictment in Dixon's case, and Foster appealed the trial court's refusal to dismiss the indictment in his case. On October 31, 1991, the District of Columbia Court of Appeals held, in the decision we are asking this Court to review, that both indictments should have been dismissed. The time within which the government could file a petition

for a writ of certiorari from that decision thus ran until January 29, 1992.

The court of appeals issued its mandates in both cases on or about November 22, 1991. Although respondents are correct that the government did not move for a stay of the mandate, respondents neglect to mention that, on December 9, 1991, the government moved in the court of appeals to recall the mandate on the ground that the Solicitor General was considering whether to file a petition for a writ of certiorari. The court of appeals took no action on that motion.

No further proceedings occurred in Dixon's case, since the trial court had originally dismissed the indictment and the mandate did not require any further action by the trial court. In Foster's case, however, the government notified the trial court that the government was considering filing a petition for a writ of certiorari. Although the government requested a postponement until a petition for certiorari was filed or a determination was made not to file such a petition, the trial court dismissed Foster's indictment on January 17, 1992. On the same day, the Solicitor General authorized filing the instant petition. On January 28, 1992, the government moved in the trial court for reconsideration of the dismissal of the indictment, informing the court that a petition for a writ of certiorari would be filed by the following day.

On January 29, 1992, the instant petition was filed.[1] On February 6, 1992, the trial court in Foster's case denied our motion for reconsideration. On February 20, 1992, we filed a notice of appeal from the dismissal of the indictment.

b. Respondents' suggestion that there is no live controversy between the parties is mistaken. Respondents

[1] On February 5, 1992, in light of the pendency of the instant petition and our motion for reconsideration in the trial court, we filed a motion in the court of appeals to hold our previous motion to recall the mandate in abeyance. As of the date on which this brief is filed, the court of appeals has not acted on either our motion to recall the mandate or our motion to hold in abeyance.

concede, as they must, that "issuance of the mandate, without more, does not deprive this Court of jurisdiction." Br. in Opp. 7 n.3. Previous decisions of this Court have firmly established, in a variety of circumstances, that the issuance of a court of appeals' mandate has no effect on the power of this Court to review the court of appeals' judgment. See, *e.g.*, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581-582 n.2 (1983); *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 467 (1947); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931).[2] See also *United States* v. *R.L.C.*, No. 90-1577, (Mar. 24, 1992), slip op. 3. The reason for that rule is that a reversal of the judgment of a lower court by this Court serves to vacate the lower court's judgment and to nullify what was done under the mandate embodying the erroneous judgment. *United States* v. *Villamonte-Marquez*, 462 U.S. at 581-582 n.2. Accordingly, the issuance of the mandate by the court of appeals in this case does not deprive this Court of jurisdiction.

Respondents argue, however, that a lower court can in effect cut off the government's ability to obtain review by dismissing an indictment before the time for filing a petition for a writ of certiorari has run. According to respondents, further review after an indictment is dismissed "would be purely advisory in nature," Br. in Opp. 5, because "the dismissals of the indictments with prejudice * * * eliminates any live case or controversy," Br.

[2] In *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885), this Court explained that the mere fact that the judgment of a lower court was complied with does not affect the ability of the losing party to obtain further review of that judgment. The court noted in *Dakota County* that a creditor may obtain execution of a judgment against a debtor and a claimant to land may execute upon a judgment of ejectment of defendant without affecting the debtor's or the defendant's ability to obtain review of the judgment involved. *Id.* at 224. Under precisely the same principle, a criminal defendant may obtain dismissal of his indictment without affecting the ability of the government to obtain further review of that dismissal.

in Opp. 7 n.3. In other words, respondents' contention appears to be that further review in this case would be "purely advisory" because this Court, should it reverse the decision below, could grant no relief to the government, *i.e.*, the indictments could not be reinstated.

Respondents do not reveal the legal authority upon which they base the novel proposition that an indictment, once dismissed, may not be reinstated. In this case, for example, Dixon's indictment was dismissed prior to trial. Yet, had the District of Columbia Court of Appeals held that the dismissal was erroneous, respondents concede that the indictment could have been reinstated. Br. in Opp. 4 n.1. The same principle would authorize reinstatement of Foster's indictment if this Court reverses the judgment of the court of appeals. Just as a trial court order dismissing an indictment is not final until the time for filing a notice of appeal has passed, a decision of the court of appeals ordering dismissal of an indictment—or affirming a prior dismissal of an indictment—is not final until the time for filing a petition for a writ of certiorari has passed.[3]

In short, nothing has occurred in this case to render it moot.[4] Certainly the fact that the indictments in this case were dismissed "with prejudice" does not affect the

[3] In respondents' own terms, "[t]he statute that authorizes the government to [petition for a writ of certiorari] from [an appellate decision requiring dismissal of an indictment] means, in effect, that such a [decision] is not final until the [decision] is affirmed [on certiorari] and the mandate [of this Court] has issued" or until the petition for a writ of certiorari has been denied. Br. in Opp. 4 n.1.

[4] Respondents wrench a statement in our brief in opposition in *Republic Nat'l Bank* v. *United States*, cert. granted, No. 91-767 (Feb. 24, 1992), entirely out of context and assert that it supports their position here. Our brief argued that the petitioner in the circumstances of that case could have avoided being bound by unfavorable circuit precedent, which was in conflict with precedent in other circuits, simply by seeking a stay of the district court decision pending appeal. The petitioner in *Republic Nat'l Bank* alleged a conflict in the circuits concerning whether a court of appeals lacks jurisdiction over an appeal from an *in rem* forfeiture proceeding

power of this Court to review the court of appeals' decision. The phrase "with prejudice" simply indicates that the dismissal will preclude reprosecution of the defendants on the same charges. That is, the term "with prejudice" means that the dismissal will be given res judicata effect in any subsequent case. But the term does not mean that the government loses all rights to further review of the dismissal in the same case. If it did, the government would never be able even to take any appeal to a court of appeals from a "with prejudice" dismissal by a district court.[5] A trial court's use of the term "with prejudice" in an order dismissing an indictment—or in any other order it might enter—has never been understood to preclude review of that order on appeal or writ of certiorari. Cf., *e.g.*, *United States* v. *Taylor*, 487 U.S. 326, 332 (1988) (reversing court of appeals' affirmance of district court dismissal of an indictment with prejudice); see also *United States* v. *Loud Hawk*, 474 U.S. 302, 310 (1986).

Nor does anything in this Court's decisions in *Preiser* v. *Newkirk*, 422 U.S. 395 (1975), or *Mills* v. *Green*, 159 U.S. 651 (1895)—the only two cases cited by respondents—support respondents' argument. In *Newkirk*, the petitioner complained that his transfer from a medium-security prison to a maximum security prison was unconsti-

after the *res* is removed from the district. We argued that the conflict may have little practical significance, since a party in the petitioner's situation could in any event avoid removal of the *res*—and thus avoid the unfavorable appellate precedent—by obtaining a stay of a district court forfeiture order. In that context, we stated that "petitioner's failure to take the minimal steps necessary to seek a stay pending appeal undermines its claim to discretionary review by this Court." 91-767 Br. in Opp. at 11. We did not make any claim concerning mootness in that case and, indeed, no such claim could have been made.

[5] Indeed, in this very case, Dixon's indictment was originally dismissed "with prejudice." Pet. App. 57a. The trial court's use of that term did not, however, render the government's appeal of Dixon's indictment moot or otherwise deprive the court of appeals, or this Court, of jurisdiction.

tutional. While the case was being litigated in the lower courts, the petitioner was retransferred back to the medium-security institution. This Court held that, because the petitioner had gotten the relief he sought and there was no longer any "reasonable expectation that the wrong will be repeated," the case was moot. 422 U.S. at 402. Similarly, in *Mills*, this Court held that, because the Court could grant no relief to a plaintiff complaining that an election held during the pendency of the action was unconstitutional, the case was moot. 159 U.S. at 657-658. Neither case involved facts remotely similar to those in this case, and neither case provides any support for respondents' contention that an indictment, once dismissed with prejudice, cannot be reinstated. In *Preiser*, the petitioner got the relief he wanted, while in this case, the government has been denied the relief it sought in the lower courts. And in *Mills*, the Court could no longer grant effective relief to the petitioner, while in this case the government will be able to reinstate proceedings against respondents if this Court reverses the judgment of the court of appeals.

2. Respondents concede that "[p]rior to the decision in *Grady* [v. *Corbin*, 495 U.S. 508 (1990)], there existed substantial and long-standing disagreement among the state and federal courts regarding the application of double jeopardy principles to successive prosecutions for contempt and substantive criminal offenses." Br. in Opp. 14. The substance of that statement is generally correct, although we disagree with respondents' characterization; in our view, the situation prior to *Grady* was one of overwhelming consensus that the Double Jeopardy Clause did not bar such successive prosecutions. Pet. 11-15.[6] What-

[6] Of the seven cases cited by respondents (Br. in Opp. 15) that had held prior to *Grady* that successive prosecutions were barred, only three are from federal courts of appeals or the highest court of a State. One of those three, *State* v. *Thompson*, 659 P.2d 383 (Or. 1983), was based on state law. See Pet. 13-14 n.10. The other two are the holdings of the New York Court of Appeals on remand from this Court's decisions in *Colombo* v. *New York*, 405 U.S. 9 (1972) (per curiam), and *Menna* v. *New York*, 423 U.S. 61 (1975). See Pet. 10 n.6. Moreover, respondents assert (Br. in Opp. 15 n.6) that four of the cases we cited in the petition involved summary contempt charges, which respondents believe should be treated differently. Even if such cases require a different analysis, a conclusion that is by no means obvious, the remaining pre-*Grady* decisions cited in our petition plainly support our contention that contempt is not the "same offense" as a substantive crime based on the same conduct.

ever the degree of disagreement in the lower federal and state courts prior to *Grady*, however, this Court's decision in *Grady* did not expressly address that disagreement or otherwise consider the application of double jeopardy principles to contempt prosecutions. Rather than assuming, therefore, as do respondents, that *Grady* and the other decisions cited by respondents (Br. in Opp. 8-11) swept away the substantial body of precedent from this Court, the lower federal courts, and the state courts permitting successive prosecutions in cases like this one, we submit that further review to consider the application of the Double Jeopardy Clause to successive prosecutions for contempt and for substantive criminal violations is warranted.

Respondents also contend that, since *Grady*, "there has been virtual unanimity" that the Double Jeopardy Clause precludes successive prosecutions for criminal contempt and a substantive criminal charge. Br. in Opp. 15. That "virtual unanimity" appears to consist of two decisions of state "court[s] of last resort," see Sup. Ct. R. 10.1(b), that agreed with the decision of the District of Columbia Court of Appeals in this case, see *State* v. *Kipi*, 811 P.2d 815 (Haw.), cert. denied, 112 S. Ct. 194 (1991); *State* v. *Magazine*, 393 S.E.2d 385 (S.C. 1990), and one decision of such a court that disagreed, see *Ex parte Williams*, 799 S.W.2d 304 (Tex. Crim. App. 1990) (en banc). Accordingly, the conflict among the lower courts on the issue presented in this case was not resolved by *Grady*, and in fact has deepened since *Grady* was decided. In light of the pre-*Grady* authority and the post-*Grady* decision in *Williams*, further review to resolve the conflict is warranted.

Respondents additionally contend that the conflict between *Williams* and the present case is "not clear" because the order at issue in *Williams* "prohibited the parties from 'causing or threatening to cause physical contact or bodily injury to each other,'" while the orders at issue in the present cases prohibited only unlawful conduct. Br. in Opp. 16, 17. As a matter of fact, that conclusion is doubtful, at least as to Foster. Foster was convicted of contempt for violating an order that he not "molest, assault, or in any manner threaten or physically abuse his" wife. Pet. App. 4a. The D.C. Criminal Code does not make it a crime to "molest" another person, and the term "molest" does not appear to refer only to conduct that could be criminally prosecuted under other criminal prohibitions. See *Webster's Third New International Dictionary* 1455 (1986) (defining "molest" as "annoy, persecute, disturb, torment"). Nor, although the D.C. Code does make it a crime to threaten to do bodily harm, see D.C. Code Ann. § 22-507 (1981), and to threaten to kidnap or injure a person or damage his property, see D.C. Code Ann. § 22-2307 (1981), is it clear that to prohibit Foster from "in any manner threaten[ing]" his wife was merely to prohibit him from engaging in conduct otherwise punishable by the criminal law.

In any event, the defendant in *Williams* was prosecuted not for merely "caus[ing] physical contact," Br. in Opp. 17, but for shooting and injuring two neighbors. Accordingly, even if the order in *Williams* differed from the orders in the present cases, as respondents suggest, the fact remains that that difference was irrelevant to the court's decision in *Williams*.[7] In short, had the present cases arisen in Texas, the indictments of Dixon and Foster would have been upheld. There is thus a clear conflict on the issue presented in this case between the District of Columbia Court of Appeals and the Texas Court of Criminal Appeals.

[7] We doubt whether the difference suggested by respondents would be of any significance in any case. It would be odd to conclude that successive prosecutions would have been permissible had the orders in the present cases been worded more broadly to encompass plainly non-criminal conduct, but that those same prosecutions were impermissible under the narrower orders that were actually issued.

3. Respondents repeatedly misstate the question we have presented in this case. According to respondents, we have asserted that "there is an exception to the protection afforded by the Double Jeopardy Clause in successive prosecution cases in cases involving prosecutions for non-summary contempt," Br. in Opp. 7, "that defendants convicted of criminal contempt should not be protected by the Double Jeopardy Clause's prohibition on successive prosecutions for the same offense," Br. in Opp. 12, and that "there is a contempt exception to the Double Jeopardy Clause's prohibition of successive prosecutions for the same offense," Br. in Opp. 14. Those characterizations of our position are erroneous.

The question presented in this case is not whether the Double Jeopardy Clause applies to criminal contempt cases, just as the question presented in *United States* v. *Felix*, No. 90-1599 (Mar. 25, 1992), was not whether the Double Jeopardy Clause applies to conspiracy cases. Rather, the question presented here is whether criminal contempt is the "same offense" as the substantive criminal offenses charged in this case, just as one of the questions in *Felix* was whether criminal conspiracy was the "same offense" as the substantive offenses charged there. The Double Jeopardy Clause applies to all criminal prosecutions; thus, it would plainly bar successive prosecutions on the same criminal contempt charge. The question presented here is whether it bars successive prosecutions for contempt and for a substantive offense based on the same conduct.

Respectfully submitted.

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APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45411